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No. 91-999

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

GARMAN CONSTRUCTION COMPANY,

Petitioner,

vs.

WILLIAM F. MARTIN, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the inability of the National Labor Relations Board to find a violation of the National Labor Relations Act based on its internal "one man unit rule" can be a defense by an employer to an action for delinquent contributions brought by a multiemployer plan pursuant to Section 515 of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1145?

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RESPONDENTS' BRIEF IN OPPOSITION

The respondents, William F. Martin, *et al.*, respectfully request that this Court deny the petition for writ of certiorari seeking review of the decision issued by the United States Court of Appeals for the Seventh Circuit.

STATEMENT OF THE CASE

The facts of the case are stated in the opinion of the United States Court of Appeals for the Seventh Circuit reported at 945 F.2d 1000 (7th Cir. 1991) and is reproduced in petitioner's appendix at page 1a. The relevant rulings of the United States District Court for the Northern District of Illinois are reproduced in the petitioner's appendix at pages 15a, 18a and 20a. Only a short review is required by the respondents.

This action was brought by the Trustees of the multiemployer plans collectively known as the Midwest Operating Engineers Fringe Benefit Funds ("Funds") alleging that Garman Construction Co. breached its obligations under a written agreement entered with the International Union of Operating Engineers Local 150 ("Union") and the Trust Agreements under which the Funds are administered. Specifically, the Funds alleged that Garman failed to pay all contributions due for work performed on its behalf by a beneficiary of the Funds. The complaint was brought pursuant to the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§ 1132, 1145.

On September 30, 1986, the district court dismissed the case with leave to reinstate pending a determination by the National Labor Relations Board of Garman's obligations under the written agreement entered with the Union (District Court Docket No. 34).

On December 14, 1987, the NLRB issued a decision and order (287 NLRB No. 12) which found, *inter alia,* that (App. 26a):

> In March, 1981, the Respondent [Garman] signed another agreement with the Operating Engineers [Union] which was substantially identical to the 1978 memorandum. The master agreement ran from July, 1978 to June, 1981 and contained a

> provision which stated that it would continue in effect unless timely notice of termination was given. The Respondent [Garman] did not provide timely notice of termination and thereby became bound by the next master agreement, which ran from 1 July 1981 to 31 May, 1984.

On June 26, 1989, the district court reinstated the action and stated it would give "collateral estoppel effect to the NLRB's determination that a contract existed between July 1, 1981 and May 31, 1984" (App. 15a). On April 9, 1990, summary judgment was entered in favor of the Funds (App. 18a).

On April 27, 1991, the district court denied Garman's motion to reconsider and held (App. 20a):

> Defendant Garman's motion to reconsider is denied. Whatever the effect *on the NLRB* of the 'one-man unit' rule as to the NLRB's power to declare an unfair labor practice, as far as this court is concerned, the April 5, 1990 order states the law to be applied in this ERISA collection case: A collective bargaining agreement bound the parties; Garman is liable for ERISA payments. The court rejects Garman's argument to not apply *Deklewa* retroactively. Not applying *Deklewa* would be contrary to ERISA and to the policy considerations underlying ERISA.

On October 17, 1991, the Seventh Circuit Court of Appeals issued an opinion upholding the rulings of the district court and held (App. 1a):

> We conclude that on the facts of this case, the Board's decision that the employer had not

committed an unfair labor practice does not preclude the district court from later finding that the employer faced liability under ERISA.

REASON FOR DENYING THE WRIT

The decision below raises no issues worthy of review.

The petitioner alleges that the decision by the United States Court of Appeals for the Seventh Circuit is in conflict with decisions of this Court and the circuits. A review of the cases cited indicate no such conflict nor any issue worthy of this Court's review. The decision of the circuit court properly considered this Court's decisions in *McNeff v. Todd,* 461 U.S. 260 (1983); *San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959); and *Laborers Health & Welfare Fund v. Advanced Lightweight Concrete Co.,* 484 U.S. 539 (1988). In addition, the decision below is in conformance with decisions in the other circuits and is easily distinguishable by its facts.

It appears the only conflict is Garman's refusal to accept the proper application by the circuit court of the NLRB's determination it was bound to an agreement and required to contribute to the Funds in accordance with ERISA Section 515, 29 U.S.C. § 1145. The NLRB in its decision and order (287 NLRB No. 12) applied principles formulated in *John Deklewa and Sons,*[1] 282 NLRB No. 184 (1987), *and found* Garman "was a party

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1. It is the usual practice of the NLRB to apply new policies to all cases pending before the Board. *Deluxe Metal Furniture Co.,* 121 NLRB 995, 1006-07 (1958). Accordingly, with respect to the issue of retroactivity, the NLRB in *Deklewa,* 124 LRRM at 1198, held:

> In sum, we conclude that the statutory benefits from the announced changes in 8(f) law for employees, employers and

(Cont'd)

to a binding 8(f) contract under *Deklewa*"[2] (App. 27a). The NLRB found (App. 26a):

> In March, 1981, the Respondent [Garman] signed another agreement with the Operating Engineers [Union] which was substantially identical to the 1978 Memorandum. The Master Agreement ran from July, 1978 to June, 1981 and contained a provision which stated that it would continue in effect unless timely notice of termination was given. The Respondent [Garman] did not provide timely notice of termination and thereby became

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(Cont'd)

> unions in the construction industry far outweigh any hardships resulting from immediate imposition of those changes. Consequently, we will apply the Board's new 8(f) principles to this case and to all pending cases in whatever stage.

2. 29 U.S.C. § 158(f) provides, in pertinent part:

> It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement . . . *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

> bound by the next Master Agreement, which ran from 1 July, 1981 to 31 May, 1984.[3]

The NLRB has adopted as policy that neither employers nor unions that are a party to an 8(f) agreement are free to unilaterally repudiate the agreement before expiration. *Deklewa,* 124 LRRM at 1187. In *NLRB v. Bufco Corp.,* 899 F.2d 608, 612 (7th Cir. 1990), the Seventh Circuit adopted the NLRB's *Deklewa* rule as "reasonable and consistent with the Act" and held:

> While we agree that the Board's *Deklewa* rule was an abrupt departure from the Board's former approach, in light of the Board's merger and conversion doctrines which could be applied at any time to abrogate *R.J. Smith's* unilateral repudiation rule, we do not believe the Company could have reasonably believed that it could repudiate its § 8(f) agreement with impunity. Finally, several benefits exist for retroactive application of the new rule. Chief among these is the avoidance of the administrative inefficiencies inherent in the application of old and new rules.

Garman's sole defense in this matter is contingent on the

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3. The duration and renewal provisions of an agreement are dictated by its specific language. The decision of the NLRB in *Deklewa* does not alter this principle. If an agreement contains termination, notice and automatic renewal provisions, then failure to terminate in the prescribed manner requires a finding of the continuation of the contractual obligations. See *NLRB v. R.J. Smith Co.*, 545 F.2d 187 (D.C. 1976); *NeDi Construction Co., Inc.*, 279 NLRB No. 71, 122 LRRM 1081 (1986); *Phoenix Air Conditioning*, 231 NLRB 341, 344 (1971); *Carrothers Construction Co., Inc.*, 258 NLRB 175 (1981); *C.E.K. Mechanical Contractors*, 295 NLRB 70 (1989), and see also Guideline Memorandum Concerning *John Deklewa & Sons*, Office of the General Counsel of the NLRB Memorandum GC 87-2 (March 20, 1987).

belief it is relieved of its obligation under ERISA § 515 to the Funds due to the inability of the NLRB to find a violation of the National Labor Relations Act based on the "one man unit rule." This defense is clearly insupportable based on a review of the decisions and rulings in this matter by the NLRB, district court and circuit court.

First, the NLRB unequivocally determined Garman bound to the written agreement. The inability of the NLRB to uphold an unfair labor practice determination based on the administrative constraint of the "one man unit rule" is no defense to an ERISA Section 515 action. *See Foreign Car Center, Inc.*, 129 NLRB 319 (1960); *also Carpenters Local Union No. 1846 v. Pratt-Farnsworth*, 690 F.2d 489 (5th Cir. 1982), *cert. denied*, 464 U.S. 932 (1983).

Second, the NLRB's decision and order created no exception to *Deklewa* to allow an employer with a one man unit to unilaterally repudiate an agreement before expiration. A simple review of the NLRB's decisions in *Garman* and *Deklewa* highlights this fact. In footnote 8 of *Garman*, the NLRB stated (App. 28a):

> We note that had the facts been different and had the unit of operating engineers been subject to fluctuations in size, only temporarily decreasing in size to a single employee unit, the Respondent's [Garman's] actions would have violated Section 8(a)(5) of the Act. *See Deklewa*, above at fn. 62.

Accordingly, the NLRB in its *Garman* decision created no exception to *Deklewa* for a one-man unit. A binding contract was found to exist but unenforceable by the NLRB. This is supported by footnote 62 of the NLRB's *Deklewa* decision which states:

> Accordingly, the Respondent's defense that it

> employed no ironworkers when it repudiated the contract is without merit. An 8(f) contract is enforceable throughout its term, although at a given time there may not be any employees to which the contract would apply.

The Seventh Circuit addressed petitioner's one-man unit argument and in its decision found that (App. 8a):

> Whether an obligation arises under ERISA involves two distinct questions: the existence of a contractual relationship covered by the act, and whether a violation occurred. The district court afforded collateral estoppel effect to the Board's ruling on the existence of a contract. The Board conclusively found that Garman had entered into a contract that ran through May 31, 1984, Decision and Order at 4 n.6, and the court gave this finding preclusive effect. Garman now claims this holding to be dicta, but it was vital to the agency's holding because, without it, the Board need not have reached the one-man rule issue. The court concluded that the Company's obligation under ERISA similarly extended to May 31, 1984.

Incredibly, Garman seeks to have the Supreme Court reach the conclusion that an employer with one employee is free to unilaterally repudiate an 8(f) agreement before expiration but would make it illegal for an employer with no employees or two employees to repudiate the same 8(f) agreement.

Accordingly, there is no conflict with the decisions of this Court or the other circuits. Nor is there an important question of law requiring review by this Court.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Court should deny the petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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